XI-JC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 604 of 2005

APPELLANT (In Jail)	:	Naresh Kumar S/o Shri Ghasiyaram, aged about 19 years, occupation Agriculturist. Resident of Village Kumhankhar, police station Kanker, Distt. Kanker (CG)
	Versus	
RESPONDENT	:	State of Chhattisgarh Through D.M. Kanker.

Present:

Mr. Pankaj Shrivastava, counsel for the appellant.
Mr. Neeraj Mehta, Panel Lawyer for the State/respondent.

ORAL JUDGMENT

(14th December 2007)

Dhirendra Mishra, J

This criminal appeal is directed against the judgment of conviction and order of sentence dated 23rd June 2005 passed in S.T.No.327/04 whereby learned First Additional Sessions Judge, Kanker, has convicted the appellant under Section 376 of the IPC and sentenced him to undergo RI for ten years, pay a fine of Rs.500/-and in default of payment of fine to undergo additional RI for one month.

2. Case of the prosecution, in nutshell, is that on 7.9.2004 at about 3.30 p.m. the prosecutrix, aged about 13 years, had gone to

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

the forest to collect firewood with her friend Jamuna. While they were collecting firewood and wax (*lakh*) the appellant reached there, drove away Jamuna by intimidating her, caught the prosecutrix, made her lie on the ground and forcibly raped her.

3. Report of the incident was lodged by the prosecutrix on 8.9.2004 at 15.10 hours vide Ex.P/11. During investigation the prosecutrix was sent for medical examination to K.D. Hospital, Kanker where Dr. (Smt.) K.L. Thakur (PW-4) examined her and gave her report of Ex.P/6. Mark-sheet of Ex.P/1 and admission register of Ex.P/12, copy of which is Ex.P/12-C of the prosecutrix were taken into possession. The accused was also medically examined by Dr. Pradip Cladius (PW-3) and his report is Ex.P/5. The prosecutrix was sent for ossification test and report of the radiologist Dr. R.C. Thakur (PW-13) is Ex.P/22.

4. After completing investigation charge sheet was filed against the appellant in the Court of Chief Judicial Magistrate, Kanker and the same was received on transfer for trial by learned Additional Sessions Judge.

5. During trial the prosecution examined 13 witnesses in all. Thereafter, statement of the accused was recorded in which he denied the evidence appearing against him in the prosecution case and pleaded innocence and false implication. However, learned

शासकीय क्षेत्रीय मुद्रणालय, राजनांदगांव —FS/59— 8/2007 —30,000.

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

trial Court after hearing counsel for the respective parties convicted and sentenced the appellant as mentioned in paragraph 1 of this judgment.

6. Learned counsel for the appellant submits that the prosecution has failed to prove that age of the prosecutrix was less than 16 years on the date of incident. The trial Court has relied upon the admission register and mark-sheet of the prosecutrix ignoring the evidence of the radiologist, who on the basis of ossification test, has opined that age of the prosecutrix could be between 14 to 17 years. The father of the prosecutrix Ishwar has stated that her age was 11 years on the date of incident, however, that is on the basis of approximation and he was not able to give exact age of the prosecutrix. In these circumstances, the Court below considering the report of the radiologist ought not to have accepted the evidence of PW-8 Parasram Netam, Head Master, who has proved the admission register of Ex.P/12-C, on the basis of which entry in the mark-sheet of Ex.P/1 has been made where the date of birth of the prosecutrix is mentioned as 20th February 1991. It is further argued that from the evidence of the prosecutrix (PW-7) it is clear that she was a consenting party and report was lodged only because her uncle Rajkumar (PW-6) saw her in the company of the appellant.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 4	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

7. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court.

8. I have heard learned counsel for both the parties and have perused the evidence available on record including impugned judgment of the trial Court.

9. To establish age of the prosecutrix, the prosecution has relied upon her mark-sheet of Ex.P/1, admission register of Ex.P/12-C and report of the radiologist Ex.P/22.

10. PW-2 Ishwar, father of the prosecutrix, has stated that age of the prosecutrix is 11 years approximately. He further stated that mark-sheet of Ex.P/1 was seized from his home vide seizure memo of Ex.P/2, which bears his signature. There is no cross-examination by the defence on the point of age and testimony of this witness remains unrebutted.

11. PW-8 Parasram Netam, Head Master, who proved the admission register of Ex.P/12-C, has stated that name of the prosecutrix is mentioned at Sl.No.558 and her date of birth is recorded as 20th February 1991 and she was admitted in the school on 3.7.1996 in Class-I. In the cross-examination he has stated that at the time of admission she was brought by her father Ishwar who put his thumb impression in the declaration form since he was illiterate and date of birth of the prosecutrix was

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

recorded on the basis of information given by her father. He has denied the suggestion that Ishwar did not give her date of birth and it was entered by guessing. PW-1 Piluram, uncle of the prosecutrix, has also given age of the prosecutrix as 13 years.

12. So far as arguments advanced by learned counsel for the appellant that radiologist Dr. R.C. Thakur (PW-13) has assessed age of the prosecutrix between 14 to 17 years on the basis of ossification test, is concerned, assessment of age on the basis of ossification test is only an opinion and where there is cogent evidence of date of birth in the form of admission register, in which entry has been made on the basis of information given by father of the prosecutrix and the evidence adduced by the prosecution stands unrebutted, opinion of the radiologist cannot be given precedence and such entries cannot be ignored. Therefore, in the considered opinion of this Court the trial Court was wholly justified in relying upon the entry made in the admission register and mark-sheet to arrive at the conclusion that the prosecutrix was less than 16 years of age on the date of incident.

13. So far as the second defence of the appellant that the prosecutrix was a consenting party, is concerned, she has categorically stated before the Court that because it was holiday she went to the forest along with her friend Jamuna to collect firewood and wax. At that time the accused came there, caught

शासकीय क्षेत्रीय मुद्रणालय, राजनांदगांव —FS/59— 8/2007 —30,000.

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 6	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

her, intimidated her friend Jamuna and drover her away, made her lie on the ground, undressed her and thereafter raped her. However, when his uncle Rajkumar reached there, the accused fled from the place of incident. PW-12 Jamuna, who accompanied the prosecutrix has also supported her version in material particulars. Leading questions were put to her as she did not fully state the version she had given in her diary statement and thereafter, she confirmed the version of the prosecutrix.

14. The testimony of the prosecutrix is also corroborated from the evidence of Tilakram (PW-5), who has deposed that the prosecutrix complained that the accused had committed rape with her. PW-6 Rajkumar has also stated that while he was going to his field, he saw the accused having intercourse with the prosecutrix. Defence in the cross-examination of these witnesses has not been able to elicit anything which makes their version unreliable or untrustworthy.

15. For the aforesaid reasons, this Court is of the considered opinion that the prosecution has been able to prove the guilt of the accused beyond reasonable doubt and the trial Court has not committed any illegality in convicting the appellant under Section 376 of the IPC based on the oral and documentary evidence available on record.

(25)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक.....**सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 7	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	16. At this stage, learned counsel for the appellant submits that at the time of incident the appellant was a young boy of 19 years and while imposing sentence the Court below ought to have taken into consideration his age. 17. In the result, the appeal is partly allowed. While maintaining conviction of the appellant under Section 376 of the IPC, his sentence of 10 years' RI and fine of Rs.500/- is hereby modified and in place thereof, he is sentenced to undergo RI for 5 years, pay a fine of Rs.1,000/- and in default of payment of fine to undergo additional RI for three months. **Sd/-** **Dhirendra Mishra** **Judge**	

शासकीय क्षेत्रीय मुद्रणालय, राजनांदगांव —FS/59— 8/2007 —30,000.